Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of AT&T Services, Inc. For	)	
Forbearance Under 47 U.S.C. § 160(c) From	)	WC Docket No. 16-363
Enforcement Of Certain Rules For Switched	)	
Access Services And Toll Free Database Dip	)	
Charges	)	
	)	

MOTION FOR SUMMARY DENIAL AND OPPOSITION TO AT&T'S PETITION OF BIRCH COMMUNICATIONS, INC.; BTC, INC.; CBEYOND COMMUNICATIONS, LLC; GOLDFIELD ACCESS NETWORK, LC; KANSAS FIBER NETWORK, LLC; LOUISA COMMUNICATIONS; NEX-TECH, INC.; AND PENINSULA FIBER NETWORK, LLC

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Date: December 2, 2016

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In accordance with the Commission's Public Notice concerning the above-captioned matter,[1] Birch Communications, Inc.; BTC, Inc.; Cbeyond Communications, LLC; Goldfield Access Network, LC; Kansas Fiber Network, LLC; Louisa Communications; Nex-Tech, Inc.; and Peninsula Fiber Network, LLC (collectively, the "Carrier Coalition") submit this Motion for Summary Denial and Opposition to the Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) (the "Petition").

I. INTRODUCTION AND SUMMARY

The Carrier Coalition emphatically opposes the Petition and respectfully requests that the Commission deny it in all respects, on both procedural and substantive grounds. Specifically, the Commission should deny the Petition, because (1) the public interest demands that the issues raised in the Petition be addressed in the Commission's Connect America Fund ("CAF")

[1] *Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules*, WC Docket No. 16-363, Public Notice, DA 16-1239 (rel. Nov. 2, 2016).

proceeding to ensure that all reforms affecting intercarrier compensation are addressed in connection with that proceeding's record and regulatory transitions,[2] (2) the Petition lacks the required evidentiary and analytical support for a forbearance request, and thus should be summarily denied, and (3) the Petition fails on substantive grounds, and if granted would cause significant disruption and uncertainty in the market for tandem switching, tandem-switched transport, and 8YY database query services.

First, any grant of the relief requested would violate the public interest standard that applies to all forbearance petitions,[3] because the imposition of piecemeal reforms sought by AT&T would defy the Commission's stated policy of reforming intercarrier compensation through a comprehensive, holistic approach.[4] In connection with this policy, which was announced in the Commission's landmark *USF/ICC Transformation Order* that implemented the initial phase of intercarrier compensation reforms, the Commission was careful to ensure that (a) its switched access rate transitions do not apply to tandem owners that do not own the end office, as such providers do not serve end-users from which to recover revenue declines associated with the transition to bill-and-keep[5] and (b) its access stimulation reforms were "narrowly tailored" to

[2] *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform—Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208 (collectively "CAF proceeding"), Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011) ("*USF/ICC Transformation Order*"), *aff'd sub. nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2072 (2015).

[3] 47 U.S.C. § 160(a)(3).

[4] *USF/ICC Transformation Order*, ¶ 13.

[5] *Id.* ¶ 1312.

only address the practices covered by the definition set forth in Rule 61.3(bbb).[6] Indeed, the Commission specifically noted that its access stimulation reforms were adopted as "part of our comprehensive intercarrier compensation reform,"[7] thereby recognizing the importance of addressing any further reforms within the context of the CAF proceeding, its evidentiary record, and all inter-related reforms.[8] AT&T's attempt to use forbearance as a vehicle to effectuate reforms that the Commission declined to adopt in the *USF/ICC Transformation Order* is therefore contrary to the public interest and should be denied on this basis alone.

Second, even when viewed in the light most favorable to AT&T, the Petition fails to meet the standard to avoid summary denial—*i.e.*, it does not "address [the] issue[s] at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," as the Commission requires.[9] To wit, the Petition is devoid of any granular evidence or market analysis, nor does it contain any affidavits or other evidence to support its factual assertions. In several instances, the Petition makes factual assertions without any citation.[10] Where citations are provided, they almost all refer to the *USF/ICC Transformation Order*, in which the Commission decided *not* to implement mandatory detariffing reforms of the type proposed by the AT&T Petition.[11] Perhaps most egregiously, AT&T's request that the Commission forbear from

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[6] *Id.* ¶¶ 33 & 672.

[7] *Id.* ¶ 672.

[8] *See id.* ¶ 672 (stating that the CAF proceeding "will, as the transition unfolds, address remaining incentives to engage in access stimulation").

[9] *In the Matter of Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, WC Docket No. 07-267, 24 FCC Rcd 9543, ¶ 30 (2009) ("*Forbearance Procedure Order*").

[10] *See, e.g.*, Petition at 15 (claiming without citation or support that unspecified carriers "have expanded their [access stimulation] activities").

[11] *See, e.g., USF/ICC Transformation Order*, ¶ 692.

permissive detariffing rules for carriers *not even engaged in access stimulation*—which the Commission explicitly declined to do in the *USF/ICC Transformation Order*[12]—is made in an unsupported footnote.[13] As the Petition therefore lacks the required factual and analytical support for its request, the Commission should summarily deny AT&T's forbearance requests.

Third, even if it were to be considered on the merits, the Petition fails to satisfy the statutory criteria applicable to forbearance petitions.[14] As discussed at length below, under a Section 10(c) forbearance petition, the *petitioner* has the burden of proof—which encompasses "both the burden of production and the burden of persuasion"[15]—to show that (1) enforcement of the rules at issue are "not necessary to ensure that charges, practices, classification, or regulations by, for, or in connection with…[the] telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory, (2) enforcement of the rules at issue "is not necessary for the protection of consumers," and (3) forbearance from applying the rules "is consistent with the public interest."[16] In addition to the Petition's failure to meet the public interest threshold for the reasons noted above, AT&T's fails to meet its affirmative burden on each of the three statutory criteria through "convincing evidence and analysis."[17]

For instance, assuming for the sake of argument that the unsupported factual assertions upon which the Petition relies were somehow considered as evidence, those assertions are entirely anecdotal and thus do not provide a basis to conclude that permissive tariffing of tandem switching, tandem-switched transport, and 8YY database services is unnecessary to ensure just

[12] *Id.* ¶ 672.

[13] *See* Petition at 15 n.21.

[14] 47 U.S.C. § 160(a).

[15] *Forbearance Procedure Order*, at ¶ 21.

[16] 47 U.S.C. § 160.

[17] *Forbearance Procedure Order*, at ¶ 14.

and reasonable charges on a market-wide basis. At best, the Petition merely describes a few encounters that, if truly problematic, could be addressed on a case-by-case basis in a Section 208 complaint proceeding. Nor does the Petition show that the permissive tariffing rules are unnecessary for the protection of consumers or that forbearance from such rules would somehow be consistent with the public interest.

In fact, for a variety of reasons described in detail below, the permissive tariffing rules at issue *are* necessary to ensure just and reasonable charges and protect consumers, and are wholly consistent with the public interest. Perhaps most significant among these is that flash-cut mandatory detariffing of charges for tandem switching, tandem-switched transport, and 8YY database services with respect to any traffic would drastically increase transaction costs for providers of such services by forcing them into difficult negotiations with many different IXCs. In the absence of a default tariffed rate, negotiation of such agreements would prove extremely difficult, especially given the fact that several federal district courts have held that state law claims—such as unjust enrichment, quatum meruit, and implied contract—may be unavailable for switched access providers seeking payment in such circumstances.[18] As such, a detariffed environment would lead to protracted negotiations with large IXCs seeking to profiteer from the existing legal limbo, during which time switched access providers' ability to get paid would be jeopardized.

A grant of the requested forbearance would therefore cause significant disruption and uncertainty in the market for tandem switching and tandem-switched transport services, harming both consumers that benefit from these services along with the public interest at large. This is so because the availability of such services are a fundamental component of today's market and

[18] *See* related discussion in Section V.A.1 *infra*.

provide carriers of all types with efficient traffic exchange options. The availability of these services also promotes important public policy objectives, such as improved network diversity, network security, and disaster recovery, by providing network redundancy and alternative routing options. Likewise, the proposed mandatory detariffing of charges for 8YY database queries would create similar uncertainties. Thus, in addition to the Petition's procedural shortcomings, its substantive flaws also necessitate that the Petition be denied.

II. THE FORBEARANCE STANDARD AND BURDEN OF PROOF

Under a petition filed pursuant to Section 10(c) of the Communications Act (the "Act"), 47 U.S.C. § 160(c), "the petitioner bears the burden of proof—that is, of providing convincing analysis and evidence to support its petition[.]"[19] This burden of proof encompasses "both the burden of production and the burden of persuasion,"[20] obligating the petitioner to prove each part of Section 10(a)'s statutory test:

> (1) enforcement of [the] regulation or provision [at issue] is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; **and**
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[21]

In determining whether the forbearance request is consistent with the public interest, the Commission is required by Section 10(b) of the Act to consider whether the requested

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[19] *Forbearance Procedure Order*, ¶ 20; *see also Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Pheonix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, WC Docket No. 09-135, 25 FCC Rcd 8622, ¶ 14 (2010).

[20] *Forbearance Procedure Order*, ¶ 21.

[21] 47 U.S.C. § 160(a) (emphasis added).

forbearance will promote competitive market conditions and enhance competition among telecommunications providers.[22] The Commission does not, however, have "an ongoing burden to justify regulation," and a Section 10(c) petition does not impose any obligation on the Commission to do so.[23]

Before the Commission substantively considers a petition for forbearance, any commenter may—no later than the due date for comments—move for summary denial,[24] and "[a] petition that on its face is incomplete or defective will be summarily denied."[25] "The legal standard for summary denial is whether the petition, viewed in the light most favorable to the petitioner, fails to meet the requirements for forbearance specified in the statute."[26] Under this standard, "a petition [that] does not address an issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," or that otherwise fails to state a *prima facie* case, is subject to summary denial.[27]

In addition to stating a *prima facie* case, the petitioner must meet its burden to demonstrate the three-part statutory test through "convincing analysis and evidence."[28] This means that the Commission "appl[ies] the forbearance standard to the arguments and evidence in

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[22] 47 U.S.C. § 160(b); *see also Forbearance Procedure Order*, ¶ 2 ("In determining whether forbearance is consistent with the public interest, the Commission…must consider 'whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'").

[23] *Forbearance Procedure Order*, ¶ 22.

[24] *Id.* ¶ 29; *see also* 47 CFR § 1.56(a).

[25] *Forbearance Procedure Order*, ¶ 27.

[26] *Id.*

[27] *Id.* ¶ 30; *see also* 47 CFR § 1.54(b) (requiring that "petitions for forbearance must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance").

[28] *Forbearance Procedure Order*, ¶ 20.

the petition; [the Commission is] under no obligation to consider other arguments that might support forbearance."[29] Further, "the petitioner's evidence and analysis must withstand the evidence and analysis propounded by those opposing the petition for forbearance."[30]

III. THE PUBLIC INTEREST REQUIRES THAT THE REFORMS SOUGHT BY AT&T BE CONSIDERED WITHIN THE CONTEXT OF THE CAF PROCEEDING, NOT THROUGH PIECEMEAL FORBEARANCE REQUESTS

Since a forbearance request cannot be granted unless doing so is in the "public interest,"[31] it should be noted at the outset that the Petition should be denied—either via summary denial or on substantive grounds—because the forbearance request contravenes the policies and objectives established in the Commission's ongoing CAF proceeding. As the Commission itself recognized in the *USF/ICC Transformation Order*, all reforms affecting intercarrier compensation are being addressed in the CAF proceeding, in view of its vast, comprehensive record, to ensure that all inter-related issues are addressed through a "holistic" approach.[32] AT&T's attempt to commandeer issues already being addressed in the CAF proceeding by seeking piecemeal reforms through a forbearance petition must therefore be rejected as contrary to the public interest.

The landmark 2011 *USF/ICC Transformation Order* comprehensively reformed the Commission's intercarrier compensation and universal service rules to promote broadband availability for all Americans. As the Commission is well aware, the development of that order was a massive undertaking in which there was "enormous interest in and public participation in

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[29] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. § 160(c) from Enforcement of Obsolete ILEC Legacy Regulations That Inhibit Deployment of Next-Generation Networks, et al.*, WC Docket Nos. 14-192, 11-42, & 10-90, Memorandum Opinion and Order, 31 FCC Rcd 6157, ¶ 8 (2015) ("*USTelecom Forbearance Order*").

[30] *Forbearance Procedure Order*, ¶ 21.

[31] *See* 47 U.S.C. § 160(a)(3).

[32] *See USF/ICC Transformation Order*, ¶ 13.

[its] data-driven reform process."[33] The reforms adopted in the *USF/ICC Transformation Order* were based on the "input of all stakeholders" and were developed through a "holistic view of the entire record…[and associated considerations] designed to better serve the public interest."[34]

As part of these reforms, the *USF/ICC Transformation Order* addressed both topics raised in the Petition here; the Commission (a) comprehensively revised the rates that LECs could tariff for switched access services and (b) adopted rules to address the practice of access stimulation.[35] However, the Commission specifically declined to adopt reforms of the type now proposed by AT&T.

First, with respect to tariffed switched access rate reforms, the Commission adopted a "uniform national bill-and-keep framework" as the "ultimate end state for all telecommunications traffic exchanged with a LEC."[36] "Under bill-and-keep arrangements," the Commission stated, "a carrier generally looks to its end-users—which are the entities and individuals making the choice to subscribe to that network—rather than looking to other carriers and their customers to pay for the costs of its network."[37]

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[33] *Id.* ¶ 12.

[34] *Id.* ¶ 13.

[35] *See id.* ¶¶ 1, 33 & 736.

[36] *Id.* ¶ 34.

[37] *Id.* ¶ 737. In rendering this holding, the Commission rejected the blanket assertion that "bill-and-keep does not enable cost recovery" and explained:

> Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support. We find that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from another carrier, ***so long as it can recover those costs from its own end users and explicit universal service support where necessary***.

Id. ¶ 757 (emphasis added); *see also id.*, ¶ 742, ¶ 775 & n.1410, ¶ 849, ¶ 994.

In its initial implementation of the bill-and-keep framework, the Commission decided to only transition terminating switched access rate elements to bill-and-keep, with an end date of July 1, 2018 for price cap carriers and July 1, 2020 for rate-of-return carriers.[38] As for originating access and other remaining rate elements, the Commission adopted a permissive detariffing regime and capped such rates at current levels until a transition timetable for these rate elements are established.[39] The Commission held, however, that the rate caps it prescribed are "default" tariffed rates, from which its rules permit carriers to deviate by agreement.[40]

Significantly, however, the Commission did not impose the transition to bill-and-keep on carriers that do not serve end-users, such as where tandem and transport providers do not own the end office. The Commission determined that application of the transition to these providers was not inappropriate, because such a provider cannot "look[] to [their] end-users … to pay for the costs of its network," as required under a bill-and-keep regime.[41] For this reason, the Commission explicitly held that "the Order does not address the transition in situations where the tandem owner does not own the end office."[42]

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[38] *See id.* ¶ 801, Fig. 9; *see also* 47 CFR §§ 51.907 ("Transition of price cap carrier access charges."), 51.909 ("Transition of rate-of-return carrier access charges.").

[39] *See USF/ICC Transformation Order*, ¶ 739, ¶ 800 & n.1494.

[40] *See* 47 CFR § 51.905(a).

[41] *USF/ICC Transformation Order*, ¶ 737.

[42] *Id.* ¶ 1312 (emphasis added); *see also id.* ¶ 1306 (explaining that "*we do not address the transition for tandem switching and transport charges if the…carrier does not own the tandem in the serving area*") (emphasis added); *id* ¶ 819 (stating that "transport charges…where the terminating carrier does not own the tandem [] are not addressed at this time."). The Commission clarified "[w]ith regard to tandem switching and tandem transport, at the end of the transition specified in the Order, rates will be bill-and-keep in the following [two] cases: (1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier [*i.e.*, end office owner] does not own the tandem serving switch." *Id.* at n.2358.

Nor did the Commission impose the bill-and-keep transition on other services—including originating switched access, the processing of 8YY originated minutes, dedicated transport—and other charges such as dedicated transport signaling and signaling for tandem switching.[43] Rather, the Commission sought further comment to supplement its existing record with regard to the proper transition and recovery mechanism for the remaining elements.[44] It also invited comment on the "existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport" and "the need for regulatory involvement and the appropriate end state for transit service."[45]

Second, the *USF/ICC Transformation Order* adopted "narrowly tailored" rules to address the practice of access stimulation.[46] When considering these reforms, the Commission specifically "reject[ed] the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition [promulgated in Rule 61.3(bbb)]."[47] Instead, the Commission required "competitive carriers and rate-of-return incumbent local exchange carriers (LECs) to refile their interstate switched access tariffs at lower rates if such a LEC (1) has a revenue sharing agreement and (2) has either a three-to-one ratio of terminating-to-originating traffic in any month or experiences more than a 100 percent increase in traffic volume in any month measured against the same month during the previous year."[48] The rate reduction

[43] *Id.* ¶ 1297.

[44] *Id.* ¶ 1297.

[45] *Id.* ¶ 1310.

[46] *Id.* ¶¶ 33 & 656 *et seq.*

[47] *Id.* ¶ 692.

[48] *Id.* ¶ 33; *see also* 47 CFR § 61.3(bbb). Specifically, if the conditions are met, a LEC subject to the rules "must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act." *USF/ICC Transformation Order*, ¶ 657.

requirements apply to all switched access rate elements assessed on access stimulated traffic, including tandem switching and tandem-switched transport, where the carrier providing such services is itself engaged in access stimulation.[49]

In adopting these rules, the Commission explicitly noted that it did ***not*** find—and that the record of the CAF proceeding did not support the conclusion—that all traffic sent to an access stimulator be subject to across-the-board mandatory detariffing.[50] In other words, the Commission explicitly rejected the relief that AT&T now seeks in the Petition.

The Commission further noted that the rules adopted "are part of our comprehensive intercarrier compensation reform" developed through input from many commenters.[51] Consistent with the holistic approach taken for the CAF proceeding overall, the Commission noted that the "reform will, as the transition unfolds, address remaining incentives to engage in access stimulation."[52] Thus, the Commission explicitly recognized the importance of making any additional reforms within the context of the CAF proceeding, so that all reforms are made through the Commission's holistic approach.

In sum, the *USF/ICC Transformation Order* (a) held that all inter-related intercarrier compensation reforms should be address through a holistic approach in the context of the vast record compiled in the CAF proceeding and (b) declined to adopt the reforms that AT&T now seeks through its Petition. The Commission:

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[49] *See, e.g.*, 47 CFR § 61.26(a)(3) & (g).

[50] *USF/ICC Transformation Order*, ¶ 672 ("Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.").

[51] *Id.*

[52] *Id.*

- Declined to impose a bill-and-keep rate transition on tandem providers where they do not serve end-users,[53] as the first part of the Petition requests,[54]
- Declined to adopt across-the-aboard mandatory detariffing for traffic sent or received to or from an access stimulator,[55] as the first part of the Petition also requests,[56] and
- Declined to adopt flash-cut, mandatory detariffing of charges for, among other things, tandem-switching, tandem-switched transport and 8YY database dips as requested by the Petition.[57]

Because all proposals declined by the Commission remain within the scope of the CAF proceeding, the public interest demands that the Petition be denied so that all such issues be addressed through the Commission's holistic approach to intercarrier compensation reform. While further reforms are under consideration, a Section 208 proceeding is the appropriate vehicle to address any case-specific issues. Notably, however, no IXCs—to our knowledge—have filed a Section 208 complaint with the Commission alleging that any default tariffed rates established under the *USF/ICC Transformation Order* are unjust and unreasonable, evidencing that the permissive tariffing regime is working soundly. As the public interest should not be

[53] *Id.* ¶ 1312.

[54] Petition at 13-18.

[55] *USF/ICC Transformation Order*, ¶ 672 ("Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.").

[56] Petition at 13-18.

[57] *See, e.g., USF/ICC Transformation Order*, ¶ 890 (finding that flash-cut reforms are "inconsistent with [the Commission's] commitment to a gradual transition and could threaten [a carrier's] ability to invest in extending broadband networks"); Petition at 13-18 & 18-23.

undermined by AT&T's attempt to bypass the holistic approach of the CAF proceeding, the Petition should be summarily denied or denied on the merits for this reason alone.

IV. THE PETITION SHOULD BE SUMMARILY DENIED, BECAUSE IT FAILS TO MEET THE EVIDENTIARY AND ANALYTICAL THRESHOLD

To avoid summary denial, a petition for forbearance "must contain facts and arguments which, if true and persuasive, are sufficient to meet each of the statutory criteria for forbearance."[58] Yet, even when viewed in the light most favorable to AT&T, AT&T failed to meet this threshold.

This fundamental flaw is readily apparent in two distinct ways. First, the entire Petition lacks the requisite evidence and analysis to support a forbearance request. Second, AT&T's request that the Commission forbear from permissive detariffing rules for carriers not even engaged in access stimulation—a request AT&T makes in an unsupported footnote[59]—indisputably fails to "address [the] issue at a sufficiently granular level to permit meaningful analysis of whether or not the statutory criteria are met," as the Commission requires.[60] The Petition should therefore be summarily denied in both respects.

A. The Entire Petition Should Be Summarily Denied, Because the Petition Lacks the Required Evidentiary and Analytical Support

As discussed above, AT&T, as the petitioner, had the burden to demonstrate the three-part statutory test through "convincing analysis and evidence."[61] The Petition, however, is devoid of any granular evidence or market analysis, does not contain any affidavits or other evidence to support its factual assertions, and seeks to rely on several factual assertions made without any

[58] 47 CFR § 1.54(b).

[59] Petition at 15 fn. 21.

[60] *Forbearance Procedure Order*, ¶ 30.

[61] *Id.* ¶ 20.

citation or support whatsoever.[62] Indeed, both parts of AT&T's Petition fail on such fundamental bases.

The first part of the Petition—AT&T's request that, whenever a provider of tandem switching and tandem-switched transport sends or receives calls from a third-party engaged in access stimulation, the Commission forbear from rules allowing the provider to assess tariffed charges for such services—lacks the requisite evidentiary and analytical support.[63] The central factual premise of this request, *i.e.*, AT&T's claim that "some carriers" have attempted to recoup revenues lost due to the Commission's access stimulation reforms by assessing higher transport charges,[64] is made up entirely of anecdotal claims and hyperbole. Rather than providing a competitive assessment based on granular market data or analysis, as required to state a *prima facie* case,[65] AT&T merely provides a small number of unsupported, vague anecdotes, from which it attempts to extrapolate a need for across-the-board forbearance.[66]

Further, these anecdotes themselves are unsupported by any affidavit or other evidence. For example, while AT&T asserts that "access stimulation LECs have been able to continue their schemes by billing inflated transport charges,"[67] it provides no citation or support and does not state what the supposedly "inflated" charges are.[68] Likewise, while AT&T asserts that some LECs have "increas[ed] both their traffic volumes and their transport charges (or shifted toward

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[62] *See generally* Petition, at 13-23. The Petition also lacks a market analysis or an appendix of supporting data, as required by the Commission's regulations. 47 CFR § 1.54(e).

[63] Petition at 13-18.

[64] *Id.* at 15.

[65] *See* 47 CFR § 1.54(e) (requiring a petition for forbearance to include an appendix that lists "[a]ll supporting data upon which the petition intends to rely, including a market analysis").

[66] *See, e.g.*, Petition at 15-17.

[67] *Id.* at 15.

[68] *See id.*

originating access schemes),"[69] the Petition does not identify the LECs to which it is referring or to what extent volumes or transport charges have supposedly increased.

AT&T similarly fails to provide any evidence for its allegation that volumes of certain LECs are "three to eight times greater" than the largest price cap LEC in the same state, nor any explanation as to why that purported fact renders tariffing requirements unnecessary on a market-wide basis.[70] Moreover, despite the requirement that a market analysis be included with any forbearance petition, the Petition fails to include any quantitative or qualitative analysis describing the market impact of these alleged increases.[71]

In similar circumstances, the Commission does not hesitate to reject such an unsubstantiated filing as defective,[72] as doing so prevents the Commission from unnecessarily expending resources to address requests that lack factual support. The same principles dictate granting summary denial here.

The second part of the Petition—AT&T's request that the Commission forbear from rules that permit tariffed charges for 8YY database queries—is similarly lacking in support. While the Petition claims that negotiated prices for database queries are "generally (i) more uniform; and (ii) lower than the tariffed rates billed by many LECs,"[73] no evidentiary support or citation is

[69] *Id.* at 16.

[70] *Id.* at 15.

[71] *Id.*at 16.

[72] For example, Section 208 formal complaints are defective as a legal matter if not supported by relevant documentation or affidavit. *See* 47 CFR §1.720(g) (in complaint proceedings, "[f]acts must be supported by relevant documentation or affidavit"); 47 CFR §1.728(b) ("Any…pleading filed in a formal complaint proceeding not in conformity with the requirements of the applicable rules in this part may be deemed defective.")

[73] Petition at 19. Even if AT&T had described specific negotiated rates, it should be noted that rates found in most complex telecommunications agreements cannot be viewed in isolation. For example, a single rate negotiated during a multi-faceted transaction, which would reflect gives

provided for this assertion. Again, despite the requirement that a forbearance requested be supported by a market analysis,[74] the Petition provides no such analysis showing, for example, what the expected level of negotiated prices for such services actually are. Other considerations, such as the increased transactional costs that switched access providers would face if negotiating individual rates with many different carriers, are completely overlooked by AT&T. The Petition therefore fails to provide any granular analysis of how the market would be impacted if 8YY database services were suddenly subject to mandatory detariffing.

Where the Petition does contain citation, it largely refers to pieces of the record proceeding referenced in the *USF/ICC Transformation Order*, in which the Commission's recent intercarrier compensation reforms and existing access stimulation rules were adopted.[75] But such references, combined with the unsupported and anecdotal assertions summarized above, do not amount to an assessment of the market demonstrating that current circumstances negate the need for the existing regulatory regime.

Moreover, as noted above, the Petition completely overlooks the fact that, upon review of the evidence in the CAF proceeding that the Petition relies on, the Commission expressly decided *not* to mandatorily detariff charges for switched access services.[76] Because AT&T seeks to have the Commission change these conclusions without providing any additional evidence or market analysis, AT&T's Petition is effectively a belated petition for reconsideration of the *USF/ICC Transformation Order* that should not be entertained. Having failed to meet the required evidentiary and analytical threshold, the Petition should be summarily denied.

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and takes on a number of issues, would be unlikely to reflect pricing that would be negotiated on an a la carte basis.

[74] *Forbearance Procedure Order*, ¶¶ 20-22.

[75] *USF/ICC Transformation Order*, ¶¶ 3 & 656 *et seq*.

[76] *See, e.g., id.* ¶¶ 672 & 890.

B. The Forbearance Request Relating to Carriers Not Even Engaged in Access Stimulation Is Devoid of Any Evidence or Analysis Whatsoever

In addition to the overall shortcomings of the Petition, one of AT&T's specific requests is made without any support whatsoever and must be summarily denied. In a single footnote, the Petition seeks "forbearance of the tariffing requirements for transport and tandem charges for calls to and from access stimulating LECs,"[77] "***even if [the provider of tandem switching and/or tandem-switched transport]… is not itself engaged in access stimulation***."[78] The footnote does not cite to any evidence or analysis whatsoever to support such expansive relief,[79] and thus clearly fails to meet the requirements to avoid summary denial.

Critically, this request seeks relief that is far broader in scope than the purported problem that AT&T claims exists. While the Petition asserts that carriers engaged in access stimulation are attempting to recoup lost end-office switching revenues by increasing transport charges,[80] the footnote in question seeks mandatory detariffing for providers of tandem switching and tandem-switched transport that may handle an access stimulator's traffic[81] but are not engaged in the associated access stimulation arrangement. As noted, the Commission specifically declined to impose access stimulation rules that would subject carriers that are ***not even involved*** in any

[77] Petition at 15 (emphasis added).

[78] *Id.* at 15 n.21 (emphasis added); *see also id.* at Appendix A (seeking forbearance from rules as applied to "[a]ll LECs, including intermediate LECs and centralized equal access ("CEA") providers, on calls originated by or terminated to LECs engaged in access stimulation, as defined in 47 C.F.R. § 61.3(bbb)").

[79] *See id.* at 15 fn. 21 (containing no citation to an evidentiary source).

[80] *Id.* at 15 and Appendix A.

[81] As noted elsewhere herein, the Commission has established benchmark rates that may be assessed pursuant to filed tariffs by carriers subject to the access stimulation rules. *See, e.g.*, 47 CFR 61.3(bbb) & 61.26(g).

access stimulation arrangement to rate reductions or mandatory detariffing.[82] Without any evidence—much less any granular analysis—demonstrating why expanding the rules to carriers that do not meet the Commission definition for access stimulation, as set forth in Rule 61.3(bbb), the Commission should summarily deny the Petition as it relates to this request.

V. ASSUMING *ARGUENDO* THE PETITION WERE NOT SUMMARILY DENIED, IT SHOULD BE DENIED ON SUBSTANTIVE GROUNDS

Although AT&T's Petition should not avoid summary denial due to its evidentiary and analytical shortcomings, it should also be denied on substantive grounds even if considered on the merits. As discussed above, AT&T—as the petitioner—has the burden of proving that all three criteria of Section 10(a)'s test are met.[83] However, as fully shown below, the Petition fails to satisfy any part of that test for both of its forbearance requests.

A. The Petition Fails to Satisfy the Statutory Criteria for Forbearance from Rules that Permit Tariffing of Tandem Switching and Tandem-Switched Transport Access Charges on Calls to and from Third-Party LECs Engaged in Access Stimulation

AT&T's first forbearance request—which asks the Commission to forbear from rules that allow providers of tandem switching and tandem-switched transport services to assess tariffed charges for such services, where traffic is sent to or received from a third-party LEC engaged in access stimulation—does not meet the statutory test. In addition to failing to meet its affirmative burden, the relief sought is overbroad in relation to the alleged (but unsupported) harms, as it targets providers of tandem switching and tandem-switched transport services that are not even engaged in the allegedly harmful activity. Moreover, the Petition fails to consider the

[82] The Commission intentionally avoided such result when adopting its existing access stimulation rules, stating that the rules are "narrowly tailored" to "avoid[] [placing] burdens on entities not engaged in access stimulation." *USF/ICC Transformation Order*, ¶ 33; *see also id.*, ¶ 672 ("Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases.").

[83] 47 U.S.C. § 160(a).

uncertainties that flash-cut mandatory detariffing would cause in the market for such services, the steep transactional costs that a detariffed environment would impose on such service providers, and the existing legal framework that may jeopardize their ability to collect payment for services provided in the absence of a tariff. As such, the Commission should deny AT&T's first request for failure to meet any of the statutory criteria.

1. The First Statutory Criterion Is Not Satisfied.

To meet the first statutory criterion, AT&T had the burden to demonstrate that enforcement of the rule at issue "is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory."[84] This part of the test requires the petition to show that no "current need" exists for the rules at issue.[85] AT&T failed to meet this burden, which encompasses "both the burden of production and the burden of persuasion,"[86] for several reasons.

First, the Petition lacks "convincing analysis and evidence" to establish that there is no current need for the permissive detariffing rules in the situations at issue.[87] As discussed at length above, the Petition does not include any overall market analysis and does not include any affidavits or documentary support for the factual assertions on which it relies, as is required to meet the petitioner's burden.[88] Instead, the Petition attempts to rely on a few (unsupported)

[84] 47 U.S.C. § 160(a)(i).

[85] *USTelecom Forbearance Order*, ¶ 8.

[86] *Forbearance Procedure Order*, ¶ 21.

[87] *Id.* ¶ 14.

[88] *See* 47 CFR § 1.54(e) (requiring a petition for forbearance to include an appendix that lists "[a]ll supporting data upon which the petition intends to rely, including a market analysis").

anecdotal descriptions of alleged arbitrage that AT&T claims to have encountered,[89] which are plainly insufficient to meet the "no current need" standard.[90]

Second, the permissive tariffing rules at issue *are necessary* to ensure just and reasonable rates and practices. To wit, if the charges for tandem switching and tandem-switched transport services were subject to mandatory detariffing as proposed by AT&T, while the rest of the intercarrier compensation regime were left intact—which is exactly what the Petition proposes[91]—IXCs would have no incentive to negotiate a reasonable rate. Indeed, given the existing legal precedent concerning whether payments are owed in the absence of a tariff or agreement, IXCs would attempt to use the absence of a tariff to delay and/or avoid payment for the services altogether.

Even under the permissive tariffing regime, IXCs have sought to avoid payment altogether where the enforceability of a specific tariff is under dispute. To do so, IXCs dispute assessed tariffed switched access charges and engage in self-help by refusing to pay any amount for the services provided. These disputes often result in collection actions, in which switched access providers seek to collect payment for services provided through both breach of tariff claims and alternative state law theories of recovery, such as unjust enrichment, quantum meruit, and implied contract.[92] However, IXCs have recently been successful in dismissing these alternative state law claims on preemption grounds, under the argument that any non-tariffed rate

[89] *See, e.g.*, Petition at 15 (discussing purported conduct by carriers in South Dakota and Iowa).

[90] As noted above, the Petition merely describes a few encounters that, if truly problematic, could be addressed on a case-by-case basis in a Section 208 complaint proceeding. 47 U.S.C. § 208.

[91] Petition at 16 n.22.

[92] As an illustrative example of the litigation that results when an IXC refuses to pay for services provided, a recent motion to dismiss filed in federal district court by AT&T is attached to this Response. AT&T Corporation's Motion to Dismiss in Part Plaintiff's Complaint; Memorandum of Points and Authorities in Support, Case No. 3:16-cv-01452-VC, Doc. 22 (N.D. Cal., filed Apr. 26, 2016) (attached as "Exhibit A").

may only be collected under a negotiated agreement.[93] Thus, if IXCs are also successful in challenging the tariff's enforceability, the IXCs receive a windfall—*i.e.*, they effectively obtain the services for free.

Similar gamesmanship occurred under the former regime governing the exchange of intraMTA traffic between LECs and Commercial Mobile Radio Service ("CMRS") providers, which provides additional evidence of the harmful effects of flash-cut mandatory detariffing. Under those former rules, a CMRS provider was required to pay "reasonable compensation" to a LEC in connection with terminating traffic originating on the network of the CMRS provider, and vice versa.[94] While many LECs filed state tariffs that included wireless termination charges as a way to impose the "reasonable compensation" obligation on CMRS providers, the Commission issued its *T-Mobile Order* in 2005, which found that intraMTA traffic should not be billed pursuant to state tariffs.[95] Instead, the *T-Mobile Order* indicated a preference for these issues to be resolved through commercial negotiations, though the general obligation to pay "reasonable compensation" remained in effect in the absence of an agreement.[96]

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[93] *See Peerless Network v. MCI Commc'ns Servs*., 2015 WL 2455128, at *8-10 (N.D. Ill. May 21, 2015) (holding that the filed rate doctrine bars recovery for service provided under equitable claims in the absence of a tariff or negotiated agreement); *see also Qwest Commc'ns v. Aventure Commc'ns Tech*., 2015 WL 711154, at *80 (S.D. Iowa Feb. 17, 2015); *XChange Telecom v. Sprint Spectrum*, 2014 WL 4637042, at *6 (N.D.N.Y. Sept. 16, 2014); *Connect Insured Tel. v. Qwest Long Distance*, 2012 WL 2995063, at *12 (N.D. Tex July 23, 2012).

[94] *See* 47 CFR § 20.11(b) (2005).

[95] *In the Matter of Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, ¶ 9 (2005) ("*T-Mobile Order*") (subsequent history omitted).

[96] *Id.* ¶ 9 (noting the Commission's "preference for contractual arrangements").

Following issuance of the *T-Mobile Order*, many of the major CMRS carriers maintained that as long as there was no negotiated agreement in place, no compensation was owed.[97] Consequently, many LECs had difficulty negotiating agreements with CMRS providers, with efforts often leading to protracted negotiations and, in many cases, litigation before federal courts and the Commission.[98] Ultimately, the Commission determined that default "reasonable compensation" rates should be set by state commissions.[99] However, this decision led to highly contested, protracted state commission proceedings, which only further delayed any resolution of the payment obligations.[100]

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[97] *See, e.g.*, Memorandum of Law of Defendants in Support of Motion to Dismiss, at 1, *Manhattan Telecommunications Corporation v. Cellco Partnership*, Case 1:09-cv-02409-RJS (S.D.N.Y. filed June 19, 2009) (arguing that the *T-Mobile Order* required reasonable compensation arrangements to "be determined exclusively by privately negotiated agreements" and seeking to dismiss state law claims for recovery); Response of Cellco Partnership d/b/a Verizon Wireless to Informal Complaint, at 2, *Informal Complaint of Line Systems, Inc. v. Cellco Partnership, et al.*, File No. EB-11-MDIC-0003 (F.C.C. filed July 12, 2011) (indicating that no payment was made due to the purported inability of the parties to reach a negotiated traffic exchange agreement); *see also North County Communications Corp. v. California Catalog & Technology*, 594 F.3d 1149 (9th Cir. 2010) (holding that FCC regulation did not provide CLECs with a private right of action to seek recovery of reasonable compensation in federal court).

[98] *See* n.93-94 *supra*; *see also PaeTec Communications, Inc. v. Cellco Partnership*, Civil Action No. 07-821 (MLC), 2007 WL 2300775, at *2 (D.N.J. Aug. 7, 2007) (referring issues concerning the identification of interMTA and intraMTA traffic to the Commission under the doctrine of primary jurisdiction).

[99] *North County Communications Corp., Complainant, v. MetroPCS California, LLC, Defendant.*, File No. EB-06-MD-007, Order on Review, 24 FCC Rcd 14036, ¶ 1 (2009) (finding that "North County must first obtain from the California Public Utilities Commission…a determination of a reasonable rate for North County's termination of intrastate, intraMTA traffic originated by MetroPCS") *aff'd sub. nom. MetroPSC California, LLC v. FCC*, 644 F.3d 410 (D.C. Cir. 2011).

[100] *See, e.g., Application of North County Communications Corporation of California (U5631C) for Approval of Default Rate for Termination of Intrastate, IntraMTA Traffic Originated by CMRS Carriers*, A.10-01-003, D.12-03-027, Order Denying Rehearing of Decision (D.) 10-06-006, 2012 WL 868973 (Cal. P.U.C. Mar. 8, 2012); *Complaint of Xchange Telecom, Inc. Against Sprint Nextel Corporation for Refusal to Pay Terminating Compensation*, Cases 07-C-1541 & 09-C-0370, Order Denying Requests for Rehearing and Granting Request for Rehearing in Part and Denying in All Other Respects, 2012 WL 106641 (N.Y. P.S.C. Feb. 17, 2012).

Given this history, a similar result should be expected if AT&T's Petition were granted. Indeed, if providers of tandem switching and tandem-switched transport services were suddenly subject to mandatory detariffing in the circumstances described in the Petition, the IXCs that utilize such tandem switching and/or transport services would have little to no incentive to enter into negotiated agreements. At the same time, tandem switching and transport providers would face tremendous uncertainties as to whether they would get paid for services provided in the absence of an agreement, due to the precedent that has been established with respect to preemption of state law claims.[101] The Commission should therefore find that there is a current need for the permissive detariffing rules.[102]

Third, the forbearance requested will not promote competitive market conditions or enhance competition among telecommunications providers.[103] Rather, the permissive detariffing rules are need to provide a level playing field for CLECs that offer tandem switching and tandem-switched transport services.

The rates of such providers that do not serve end users are generally disadvantaged vis-à-vis their ILEC competitors when operating under rate caps, given that ILECs can recover tandem switching and tandem-switched transport costs through their charges to end-users while such

[101] *See* Exhibit A & n.94 *supra* (citing cases).

[102] If the Commission were to grant the forbearance that AT&T seeks (which it shouldn't), the Commission should impose conditions and issue appropriate clarifications on any forbearance grant to ensure that IXCs do not escape their financial responsibility to pay detariffed charges in the absence of a negotiated agreement.

[103] *See* 47 U.S.C. § 160(b); *see also Forbearance Procedure Order*, ¶ 2 ("In determining whether forbearance is consistent with the public interest, the Commission…must consider 'whether forbearance from enforcing the provision or regulation will promote competitive market conditions.'").

competitive providers cannot.[104] Competitive providers of tandem switching and tandem-switched transport also face high collection costs, given the noted attempts by IXCs to aggressively dispute and withhold switched access charges.[105] Since permissive detariffing is therefore a key factor in creating certainty for such competitive tandem and transport providers, the business models of such providers often rely on tariffs to ensure revenue streams. At the same time, however, alternative tandem and transport services, along with the availability of direct trunking, places downward pressure on tariffed rates, ensuring that tariffed rates must be competitive with those alternatives.[106]

Fourth, the forbearance requested is wholly unnecessary, because the Commission's existing rules already ensure that rates for tandem switching and tandem-switched transport are just and reasonable. As AT&T recognizes, the tariffed switched access rates of CLECs that offer competitive tandem switching and transport services are capped.[107] Further, when such a provider

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[104] *See USF/ICC Transformation Order*, ¶¶ 737 & 1312. As indicated above, while the Petition claims that the rates of some tandem switching and transport providers are too high, it provides no cost information to substantiate that claim and is thus unsupported. For example, AT&T does not show what its ILEC affiliate's unsubsidized costs are to provide tandem switching and tandem-switched transport in markets similar to those which have experience the alleged rate increases, nor does it show what its costs would be if is simply obtained services via a direct trunking arrangement rather than obtaining tandem switching and tandem-switched transport on a per minute of use basis.

[105] *See* n.93-94 and accompanying text *supra.*

[106] Contrary to AT&T's unsupported claims (Petition at n.20), because IXCs can obtain direct connections (assuming they are credit worthy and have no unpaid invoices) and avoid tandem switching and tandem-switched transport charges altogether, there is no need for the Commission to forbear from its tariffing rules. Establishing direct connections is a simple solution for IXCs, because the charges for dedicated facilities are typically lower than the charges that apply to route high-volume traffic using tandem switching and tandem-switched transport services. Notably, the AT&T Petition does not provide any evidence or analysis showing that obtaining direct trunking does not provide a market-based solution for the problem it claims to exist.

[107] Petition at 5; 47 C.F.R. § 61.26; *see also AT&T Services, Inc. and AT&T Corp. v. Great Lakes Comnet, Inc. and Westphalia Telephone Company*, File No. EB-14-MD-013, Memorandum

engages in access stimulation, as that term is defined in 47 C.F.R. § 61.3(bbb), its tariffed rates are already automatically detariffed *unless* reduced to the lowest rate assessed by any price cap ILEC in the same state.[108] As noted, the Commission specifically declined to impose mandatory detariffing on carriers engaged in access stimulation.[109] Thus, to the extent the Petition claims that certain carriers engaged in access stimulation are assessing rates above the existing caps, the Commission's existing rules already provide AT&T with a basis to challenge those rates.

Lastly, AT&T has not satisfied its burden to prove that the permissive tariffing rules are no longer necessary to avoid unjust and unreasonable discrimination. Ironically, this burden cannot be met, because the requested forbearance would itself result in discriminatory treatment of like providers. If the Petition were granted, a competitive provider of tandem switching and tandem-switched transport that happens to deliver or receive traffic to or from a third-party access stimulator would be subject to mandatory detariffing, even if the provider is not itself engaged in access stimulation.[110] However, if a competitive tandem or transport provider subject to subject to 47 C.F.R. § 61.26 *is* engaged in access stimulation, but does not deliver or send traffic to a LEC engaged in access stimulation, then that provider would *not* be subject to mandatory detariffing. Instead, such a provider would, under Rule 61.26(g), be permitted to assess tariffed rates equal to "the rate prescribed in the access tariff of the price cap LEC with the

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Opinion and Order, 30 FCC Rcd 2586, ¶ 20 (2015) *aff'd in rel. part, remanded on other grounds, sub. nom. Great Lakes Comnet, Inc. v. FCC*, 83 F.3d 998 (D.C. Cir. 2016).

[108] 47 C.F.R. § 61.26(g) (providing that "[a] CLEC engaged in access stimulation…shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the access tariff of the price cap LEC with the lowest switched access rates in the state").

[109] *USF/ICC Transformation Order*, ¶ 692.

[110] Petition at 15 n. 21.

lowest switched access rates in the state."[111] These disparate effects would thus result in discriminatory treatment of such providers.

In short, the Petition is entirely insufficient to carry AT&T's burden of proof that the rules at issue are no longer necessary. The Commission should therefore find that AT&T failed to demonstrate that the first criterion of the statutory test is satisfied.

2. The Second Statutory Criterion Is Not Satisfied.

To meet the first statutory criterion, the petitioner must show that enforcement of the rules at issue "is not necessary for the protection of consumers."[112] As with the first criterion, the Commission must consider whether there is a "current need" for the rule to protect consumers.[113] As such, the analysis under the second criterion often overlaps with the first.[114]

Given the overlap between the first and second criteria, the Petition fails to meet the second for many of the same reasons it fails to meet the first. For example, as discussed at length in Section V.A.1., above, the Petition fails to meet AT&T's burden to establish that the permissive detariffing rules are not necessary through "convincing evidence and analysis."[115] Indeed, while the Petition again relies almost entirely on references to the *USF/ICC Transformation Order* as the premise for its request, the Commission ***specifically declined*** to

[111] 47 CFR § 61.26(g).

[112] 47 U.S.C. § 160(a)(2).

[113] *See USTelecom Forbearance Order*, ¶ 8 ("In evaluating whether a rule is 'necessary' under the first two prongs of the three-part section 10 forbearance test, the Commission considers whether a current need exists for a rule. In particular, the current need analysis assists in interpreting the word 'necessary' in sections 10(a)(1) and 10(a)(2).").

[114] *Verizon v. FCC*, 770 F.3d 961, 964 (D.C. Cir. 2014) (noting that "there is a great deal of overlap in the three factors").

[115] *Forbearance Procedure Order*, ¶ 20.

grant the broad relief sought by AT&T upon review of that record.[116] The same shortcomings of the Petition are thus also fatal under the analysis of the second statutory criterion.

Additionally, the rules at issue here are needed to protect consumers in a number of ways. With respect to carrier customers, permissive tariffing provides an efficient means to obtain alternative tandem switching and tandem-switched transport services when the transaction costs associated with negotiated arrangements may be too expensive. Permissive tariffing also provides rate certainty to carrier customers of different sizes, because they have access to the same default rates, whereas in a detariffed environment, that would not be the case. The forbearance requested would thus deprive consumers of these protections.

The Petition therefore fails to demonstrate that the permissive tariffing of tandem switching and tandem-switched transport, which AT&T seeks to eliminate, is not necessary to protect consumers. Accordingly, the Petition should be denied for failure to satisfy the second criterion of the statutory test.

3. The Third Statutory Criterion Is Not Satisfied.

To satisfy the third criterion, the petition must demonstrate that "forbearance from applying [the rules at issue] is consistent with the public interest."[117] This part of the test requires the Commission "to consider whether forbearance is consistent with the public interest, an inquiry that also may include other considerations"[118]—including "whether forbearance will

[116] *USF/ICC Transformation Order*, ¶ 672 ("Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation.").

[117] 47 U.S.C. § 160(a)(3).

[118] *USTelecom Forbearance Order*, ¶ 8.

promote competitive market conditions."[119]

The Petition fails to satisfy the third criterion for a number of reasons. First, as fully discussed in Section III above, the public interest demands that any reforms to the regime under which charges for tandem switching, tandem-switched transport, and other switched access services are assessed be address comprehensively within the context of the CAF proceeding, rather than a forbearance proceeding. As noted, the Commission explicitly declined in the *USF/ICC Transformation Order* to adopt the reforms that AT&T seeks here, and stated that all inter-related intercarrier reforms should be considered through the "holistic" approach of the CAF proceeding.[120] Any grant of forbearance on individual issues at stake in the CAF proceeding—such as AT&T's mandatory detariffing proposal here—is thus against the public interest and the Commission's stated policies.

Second, as with the other statutory criteria, the Petition suffers from a lack of evidentiary and analytical support. As discussed in full above, while the Petition relies on anecdotal claims that some unidentified tandem switching or tandem-switched transport providers have engaged in arbitrage, the Petition provides no affidavit or documentary support for such assertions.[121] As such, AT&T failed to carry its burden of proof to demonstrate that the requested forbearance is in the public interest.

Third, it is easily shown that the requested forbearance is not in the public interest. As explained above, the imposition of mandatory detariffing would disadvantage tandem switching and tandem-switched transport providers. In a detariffed environment, IXCs would be incentivized to protract negotiations and/or avoid entering a negotiated agreement altogether in

[119] *Id.* ¶ 10.

[120] *USF/ICC Transformation Order*, ¶ 13.

[121] *See* Petition at 17-18.

order to obtain services for free in the absence of an agreement.[122] Such conduct would create uncertainty as to whether providers of tandem switching and tandem-switched transport would be paid for the services they provide, and would potentially cause some of them to stop providing services to certain LECs to avoid risk of non-payment. The attendant uncertainties would harm the public interest by diminishing competition in the tandem and transport services market, thereby undermining the many public interest benefits that such services provide, such as improved network diversity, network security, and disaster recovery.

Finally, the requested relief is inconsistent with the public interest due to the logistical problems that would result if granted. As noted, the Petition seeks to impose mandatory detariffing on any providers of tandem switching or tandem-switched transport that deliver or receive traffic to or from a third-party LEC engaged in access stimulation, even if the tandem and transport providers are not engaged in access stimulation. It is entirely unclear, however, how such providers would know when a third-party LEC *is in fact* engaged in access stimulation. For example, providers of tandem switching and tandem-switched transport would generally have no basis to know whether a third-party had a revenue-sharing agreement. As a result, such providers would have no practical way of responding to IXC disputes based on actions of the third-party, such that any dispute would potentially require the initiation of litigation to obtain relevant evidence. This in turn would increase transaction costs and legal fees of such providers, resulting in higher prices and reduced competition in the tandem and transport market.

For these reasons, AT&T's forbearance request is not in the public interest. As AT&T therefore failed to satisfy the third statutory criterion, the Commission should deny the Petition on this basis as well.

[122] *See* Section V.A.1 *supra.*

B. The Petition Fails to Satisfy the Statutory Criteria for Forbearance from Rules Permitting Tariffed Charges for 8YY Database Dips

The Petition's second forbearance request—a request that the Commission forbear from rules permitting tariffed charges for 8YY database dips—similarly fails to carry AT&T's burden of proof. Indeed, the Petition again fails to meet AT&T's burden as to each statutory criteria, such that this aspect of the Petition should likewise be denied.

1. The First Statutory Criterion Is Not Satisfied.

AT&T fails to demonstrate through "convincing evidence and analysis" that the Commission's existing permissive tariffing regime governing charges for 8YY database services is not necessary to ensure that such charges remain just and reasonable. The Petition provides no evidence demonstrating that existing tariffed rates are unreasonable; in fact, the only "evidence" it provides is a one-footnote summary referring to the tariffed rates of 6 LECs.[123] Such a scant list of rates does not amount to a market analysis of the type required to meet the forbearance standard.[124] Moreover, the Petition fails to analyze the context of each of the rates mentioned, such as whether other rate elements associated with the routing of 8YY traffic are higher or lower. As such, the Petition fails to satisfy AT&T's burden of proof.

Further, the permissive tariffing of charges for 8YY database dips *is* necessary to ensure such charges are just and reasonable and are not unjustly and unreasonably discriminatory. For the same reasons discussed above, IXCs would have little incentive to negotiate a reasonable rate if 8YY database dips were subject to mandatory detariffing, which would in turn create risk that providers would not get paid when providing this service.[125] A detariffed environment would also

[123] Petition at 19 n.29.

[124] *Forbearance Procedure Order*, ¶¶ 20-22.

[125] *See* Section V.A.1 *supra*.

advantage large IXCs over smaller ones, given that large IXCs with large traffic volumes would have bargaining advantages vis-à-vis smaller IXCs, resulting an un-level playing field.

To the extent AT&T or another IXC believes that a particular charge is too high, such carriers already have a sufficient avenue to challenge the rate—*i.e.*, a Section 208 proceeding. The scant evidence and analysis provided in the Petition, however, is entirely insufficient to meet the first statutory criterion for forbearance, and as such the Petition should be denied.

2. The Second Statutory Criterion Is Not Satisfied.

For the same reasons described in Section V.B.1 above, the Petition fails to meet AT&T's burden of proof to show that permissive tariffing of charges for 8YY database dips are not necessary for the protection of consumers. In addition, the forbearance request fails to consider why permissive tariffing of charges for 8YY database dips remains necessary to protect consumers.

8YY services are designed so that the customer of the service—*i.e.*, the party receiving the call—pays all charges associated with the service, allowing the caller to make the call without paying, or "toll-free." The permissive tariffing regime thus ensures that carriers performing the 8YY database dips are justly compensated for handling traffic on behalf of the provider serving the 8YY end-user customer, so that such calls can be placed on a "toll-free" basis.

If charges for 8YY database dips were mandatorily detariffed, IXCs would, as discussed above, seek to avoid paying these charges through protracted negotiations.[126] Notably, AT&T does not commit to lowering its end-user or wholesale 8YY rates, which only further indicates

[126] *See id.*

that the Petition is a merely AT&T's attempt to shift its costs onto other providers through regulatory fiat.

Moreover, if providers of 8YY database dips are not paid for providing this service, the providers may decide not to process the 8YY calls altogether, potentially jeopardizing 8YY calls from being completed and thereby harming the end-user customers. As such a result would harm consumers, rather than protect them, the Petition should be denied for failure to meet the second statutory criterion.

3. The Third Statutory Criterion Is Not Satisfied.

Finally, the Petition fails to meet AT&T's burden to prove that mandatory detariffing of charges for 8YY database dips is consistent with the public interest. As discussed at length above, the public interest demands that any mandatory detariffing of such charges and related switched access service be addressed comprehensively and holistically in the context of the CAF proceeding. Further, flash-cut mandatory detariffing of charges for 8YY database dips would, as also discussed above, harm competition by creating uncertainty for service providers as to whether and how they will get paid for providing such services. The requested forbearance would therefore not promote competition, but instead would threaten to reduce it, which is not in the public interest. As such, the Petition should likewise be denied for failure to meet the third statutory criterion.

VI. CONCLUSION

For the foregoing reasons, the Commission should deny AT&T's Petition, either summarily or on substantive grounds.

Respectfully submitted,

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